

ADMINISTRATIVE APPEAL DECISION

LAYCOM, INC., FILE NO. 200100426

CHICAGO DISTRICT

NOVEMBER 28, 2001

Review Officer: Suzanne L. Chubb, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division, Cincinnati, Ohio.

Appellant Representative: Ms. Johnine J. Brown, The Brown Environmental Law Group, P.C., Chicago, Illinois.

Jurisdiction: Section 404 of the Clean Water Act (33 U.S.C. 1344).

Receipt of Request For Appeal (RFA): August 16, 2001.

Appeal Conference/Site Visit: None.

Background Information: The site is located north of Division Street and east of Weber Road in the City of Crest Hill, Lockport Township, Will County, Illinois. In a letter dated February 22, 2001, the appellant's consultant requested a jurisdictional determination (JD) of the site. The consultant furnished the District with recent site photographs, a 1999 aerial photograph and a wetland conservation determination performed by the Natural Resources Conservation Service (NRCS). The NRCS determined that two farmed wetland areas, totaling 12.9 acres, are present on the site. The smallest wetland area is located along the southern boundary of the site, adjacent to Division Street. The majority of the wetland area lies in a shallow trough area that traverses the northern third of the site. The Will County soil survey shows a hydric soil, Ashkum silty clay loam, in the wetland areas.

Personnel with the Chicago District regulatory staff (District) performed a site visit on March 21, 2001. A letter, dated June 19, 2001 to the appellant, informed them that the subject property contained jurisdictional "waters of the United States". Although the appellant's consultant submitted additional information to the District on July 5, 2001, the District's JD decision remained unchanged. The appellant has appealed this determination to the Division office.

Based on the RFA, the appellant claims that neither the northern nor southern farmed wetlands have a "direct surface connection to a stream or creek" via a stream, ditch or other channel. The northern farmed wetland drains west to the property line where it flows through a subdivision swale into a man-made storm water retention pond. The northern farmed wetland is approximately 200-300 feet from the retention pond/emergent wetland. From there, water is conveyed west and northwest by pipe to Weber Road and

Mink Creek. Mink Creek is a tributary of Lily Cache Creek, the DuPage River and ultimately the Des Plaines River, a navigable waterway.

In a September 14, 2001 letter to the appellant, I was delegated the authority to serve as both the Review Officer and decision authority regarding this RFA. This delegated authority is allowed by regulations at 33 CFR 331.3(a)(1).

Appeal Decision and Instructions to Chicago District Commander (DE):

Appeal Reason 1: Neither of the two onsite wetland areas are “adjacent” within the meaning of the Clean Water Act, Corps regulations, or case law.

Finding: This appeal reason does not have merit.

Action: No action required.

Discussion:

The Corps regulates wetlands located “adjacent” to waters of the U.S., defined at 33 CFR 328.3(c) as bordering, contiguous or neighboring, and wetlands that are part of a tributary system to navigable waters of the U.S. Regulatory jurisdiction over “waters of the U.S.” under the Clean Water Act (CWA) is not confined to areas comprising “navigable waters” under the Rivers and Harbors Act of 1899. Non-isolated farmed wetlands are jurisdictional waters of the U.S.

The Supreme Court in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) addressed the question of whether it is reasonable, in light of the language, policies, and legislative history of the [Clean Water] Act for the Corps to exercise jurisdiction over wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as “waters” (*Id.* at 131). The Court gave significant deference to Corps’ technical expertise when it stated that “...the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act” (*Id.* at 134). Further, the Court determined that this deference “holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water” (*Id.* at 134). Therefore, the Court found to be reasonable the Corps’ premise that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic ecosystem, even when the water that created the wetlands does not have its source in adjacent water bodies.

In the recent SWANCC decision, the Court did not overrule the holding or rationale of *United States v. Riverside Bayview Homes, Inc.* that traditionally navigable waters, interstate waters, their tributaries, and adjacent wetlands are still considered “waters of the United States.” In SWANCC, the Supreme Court held that the Corps exceeded its statutory authority by asserting CWA jurisdiction over an abandoned sand and gravel pit

in northern Illinois that provides habitat for migratory birds. The Court's holding was narrowly limited to the conclusion that the Migratory Bird Rule (51 Fed. Reg. 41217 (1986)) as implemented by the Corps under 33 C.F.R. 328.3(a)(3) is not supported by the CWA, thus the holding is strictly limited to waters that are non-navigable, isolated, and intrastate where the sole basis for jurisdiction is habitat for migratory birds. Any waters outside of that category may still be regulated under the CWA to the full extent of the Corps' authority under the statute and regulations and consistent with case law.

The District project manager has informed me that he determined that the small southern farmed wetland is an isolated wetland and non-jurisdictional. Therefore, this area is not in dispute and the remainder of this discussion will focus on the northern farmed wetland.

In the explanation of its RFA, the appellant declared that the law of the Seventh Circuit indicates that "artificial structures such as detention ponds are not jurisdictional 'other waters' of the United States," citing *Village of Oconomowoc Lake v. Dayton Hudson Corps.*, 24 F.3d 962 (7th Cir. 1994). This case is not clearly parallel to the present situation on the appellant's property. In *Village of Oconomowoc Lake*, the Court determined that a six-acre retention pond built in conjunction with the construction of a warehouse was not part of "waters of the United States" within the coverage of the CWA, even if the pond drained into groundwaters. The appellant's property has a wetland that drains through a manmade drainage swale and retention pond located within hydric soils to a surface tributary that ultimately reaches a navigable waterway. The waters of the United States in question here exist in an area with a history of natural headwater drainage, complete with hydric soils, to navigable waters. The *Village of Oconomowoc Lake* case does not appear to be on point based on the Court's recitation of the facts.

I find that the District's administrative record supports its conclusion that the northern farmed wetland is a jurisdictional water of the United States. The file contains various maps, site photos and aerial photographs. A 1923 U.S. Geological Survey (USGS) map, updated in 1942, shows a branch of an intermittent tributary to Mink Creek in the approximate location of the current onsite northern wetland. The historic drainage has been altered since that time through farming practices and the construction of the adjoining Massey Estates subdivision in 1976. A 1964 USGS map and more recent aerial resources - the 1980 Will County Soil Survey and the 1983 National Wetland Inventory map - do not show the intermittent tributary.

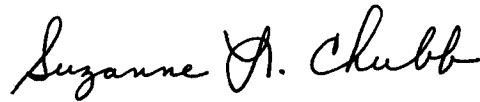
Man-made hydrologic modifications occurred when the site was tiled and the subdivision construction included a berm (design height 635.0 feet) along a portion of its eastern property line (just west of the project site). The tiles appear to outlet just west of the berm, into a subdivision drainage swale that directs flow north and west to the subdivision retention pond. A resident in the adjoining subdivision recently created a breach in the berm to allow surface water flow from the project site.

The current circumstances, although created by man, replaced the historic natural channel and flow that existed in the area until sometime after 1942. The current wetland and the

adjoining subdivision swale and retention pond also appear to lie within the Ashkum hydric soil series. Therefore, the current northern farmed wetland is part of and connected to a surface tributary system to navigable waters (the Des Plaines River) and regulated pursuant to current Corps regulations. Further, under 33 CFR 328.3(c), the northern wetland would be considered "adjacent" and jurisdictional regardless of the recent breach in the low-level dike on the adjoining subdivision. The man-made obstruction (dike) to surface water flow would not negate a finding that the northern wetland borders and is a part of the same aquatic ecosystem that drains to Mink Creek.

Conclusion: For the reasons stated above, I conclude that this Request For Appeal does not have merit.

FOR THE COMMANDER:

A handwritten signature in cursive script, reading "Suzanne L. Chubb".

SUZANNE L. CHUBB
Appeal Review Officer
Great Lakes & Ohio River Division